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Mistreating a Symptom: The Legitimizing of Mandatory, Indefinite Commitment of Insanity Acquittees - Jones v. United States

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Mistreating a Symptom: The Legitimizing of Mandatory, Indefinite Commitment of Insanity Acquittees — *Jones v. United States*

At the end of the 1982 term, in Jones v. United States, *the United States Supreme Court upheld a District of Columbia statute requiring the automatic and indefinite commitment of persons acquitted by reason of insanity. While under the D.C. statute the acquittee is periodically given the opportunity to gain release, the practice of involuntarily confining someone who has been acquitted raises serious due process and equal protection issues. This note examines the Court's analysis of these issues, focusing on a comparison of the elements necessary for an insanity defense with the showing required by the due process clause for involuntary civil commitment.*

I. INTRODUCTION

Since its inception,[1] the marriage of psychiatry and law embodied in the insanity defense has been the source of intense ideological debate. While the legislatures and the judiciary have been called upon to resolve such complex issues as the definition of sanity itself, the most difficult issue associated with the defense[2] is the disposition of the person acquitted by reason of insanity.

The insanity acquittee is in a peculiar position. Although the acquittal signifies a lack of criminal responsibility, precluding punishment, assertion of the defense is tantamount to an admission that the defendant committed the criminal act in question.

1. The precise origins of the insanity defense are unknown. While legal theorists such as Braxton and Coke had reflected upon the effects of insanity on criminal responsibility, it was not until the late eighteenth century that the insanity defense gained wide judicial acceptance. *See generally* A. GOLDSTEIN, THE INSANITY DEFENSE 9-11 (1967).

2. The American Law Institute Model Penal Code test for insanity used by the federal courts and about one-half of the states, provides: "A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." MODEL PENAL CODE § 401 (Proposed Official Draft 1962).

Most of the remaining states use the *M'Naghten* test which focuses on whether the accused was laboring under such a defect of reason, from disease of the mind, as to not know the nature and quality of his action; or, if he did know, he did not know that what he was doing was wrong. American Bar Association, *The Insanity Defense ABA and APA Proposals for Change,* 7 MENTAL DISAB. L. REP. 136-38 (1983).

This admission makes immediate release of the acquittee unpalatable as a matter of public policy. Detention of the insanity acquittee solely on the basis of his successful assertion of the defense, however, is difficult to justify according to legal theory. The insanity acquittee has neither been convicted nor adjudged civilly insane.[3]

The response of the state legislatures to this dilemma has been varied. Some have chosen to enact criminal commitment statutes, while others have left the problem to the courts.[4] Of the var-

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3. Civil commitment refers to the process by which one thought to be mentally ill is committed to a state mental hospital. The process includes protection of the individual's due process rights, notably the right to a jury trial with the state bearing the burden of proving, by "clear and convincing" evidence, the defendant's insanity and dangerousness. *See* Addington v. Texas, 441 U.S. 418, 425-33 (1979); O'Connor v. Donaldson, 422 U.S. 563, 573-76 (1975).

4. The commitment provisions of state law concerning persons acquitted due to insanity can be grouped into four categories. The first includes those which recognize automatic commitment following an acquittal based on the insanity defense. As of 1981, ten jurisdictions had such laws. COLO. REV. STAT. § 16-8-105 (1973); DEL. CODE ANN. tit. 11, § 403(a) (1979); D.C. CODE ANN. § 24-301(d)(1) (1981); GA. CODE ANN. § 27-1503(d) (1981); KAN. STAT. ANN. § 22-3428(1) (Supp. 1979); LA. CODE CRIM. PROC. ANN. art. 654 (West Supp. 1980) (capital cases); ME. REV. STAT. ANN., tit. 15, § 103 (1980); MO. ANN. STAT. § 552.040(1) (Vernon Supp. 1980); NEV. REV. STAT. § 175.521(1) (1975); WIS. STAT. ANN. § 971.17(1) (West 1971).

The following is an example of one such statute: "When a defendant is acquitted on the ground of mental disease or defect excluding responsibility, the court *shall* order such person to be committed to the director of the department of mental health for custody, care, and treatment in a state mental hospital." MO. ANN. STAT. § 552.040(1) (emphasis added).

The second category includes those which give the trial court discretion in deciding whether and where to confine the defendant. Twelve states have adopted some form of this approach. ARK. STAT. ANN. § 41-612(1)(a) (1983); CAL. PENAL CODE § 1026 (West Supp. 1980); FLA. R. CRIM. P. 394.467 (Supp. 1983); HAWAII REV. STAT. § 813.2, Rule 21 (West 1979); MD. ANN. CODE art. 12, § 170 (1982); MISS. CODE ANN. § 99-13-7 (1972); N.H. REV. STAT. ANN. § 651:9 (Supp. 1983); N.J. STAT. ANN. § 2C:4-8 (West 1978); OR. REV. STAT. § 161.325 (1979); UTAH CODE ANN. § 77-14-5 (Supp. 1983); WASH. REV. CODE ANN. § 10.77.110 (1980); WYO. STAT. ANN. § 7-11-306 (1977).

The third category includes those states which allow a temporary commitment of insanity acquittees pending a full hearing on their present mental state. Eleven states have such laws. ALASKA STAT. § 12.45.090 (1980); CONN. GEN. STAT. ANN. § 53a-47 (West Supp. 1984); LA. CODE CRIM. PROC. ANN. art. 654 (West Supp. 1980) (non-capital cases); MASS. GEN. LAWS ANN. ch. 123, § 16 (West Supp. 1983-84); MICH. COMP. LAWS ANN. § 14.800(1050) (1980); MONT. CODE ANN. § 46-14-301 (1979); NEB. REV. STAT. § 29-2203 (1979); N.Y. CRIM. PROC. LAW § 330.20 (McKinney Supp. 1984); R.I. GEN. LAWS § 40.1-5.3-4(b)-(d) (Supp. 1983); TENN. CODE ANN. § 33-709 (Supp. 1983); W. VA. CODE § 27-6A-3 (1980).

The fourth category includes those states which require the individual's disposition under the general civil commitment law of the state. Fifteen states have adopted this approach. ALA. CODE § 2252-33 (1975); ARIZ. R. CRIM. P. 25 (1973); ILL. ANN. STAT. ch. 38, § 1005-2-4 (Smith-Hurd 1982 & Supp. 1984); IND. CODE ANN. § 35-5-2-5 (Burns 1979); MINN. R. CRIM. P. 20.02 (8) (West 1979 & 1984); N.M. R. CRIM. P. 35(2) (1983); N.C. GEN. STAT. § 15A-1321 (1978); N.D. CENT. CODE § 12.1-04-10 (Supp. 1983); OHIO REV. CODE ANN. § 2945.40(A) (Baldwin 1979); OKLA. STAT. ANN. tit. 22, § 1161 (West Supp. 1983-84); PA. STAT. ANN. tit. 50, § 7406 (Purdon Supp. 1984); S.C.

ious schemes adopted, those which require automatic commitment have most often been the subject of constitutional attack on due process or equal protection grounds.[5]

On November 2, 1983, amidst the heated public, professional, and legislative debates regarding the insanity defense sparked by the Hinckley[6] verdict announced only four months earlier, the United States Supreme Court heard arguments for the case of *Jones v. United States.*[7] The *Jones* case presented a challenge to the District of Columbia's mandatory commitment statute regarding insanity acquittees.[8] In a surprising departure from a line of

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CODE ANN. § 44-23-610 (Law. Co-op. 1976); S.D. CODIFIED LAWS ANN. § 23A-26-12 (Supp. 1983); TEX. CRIM. PROC. CODE ANN. art. 46.03. § 4(a) (Vernon 1979); VT. STAT. ANN. tit. 13, §§ 4820(4) (1974), 4822 (Supp. 1983).

5. The equal protection argument is that insanity acquittees should be given the procedural safeguards provided in the civil commitment context because there is no rational basis for distinguishing between civil commitment and commitment of insanity acquittees. The due process argument rests principally on Addington v. Texas, 441 U.S. 418 (1979). In *Addington* the Supreme Court held that the due process clause requires the government, in a civil commitment proceeding, to demonstrate by clear and convincing evidence that the individual is presently both mentally ill and dangerous. It is claimed these standards are not met by an insanity acquittal because there is no finding of present mental illness and dangerousness. *See* United States v. Brown, 478 F.2d 606 (D.C. Cir. 1973); Bolton v. Harris, 395 F. 2d 642 (D.C. Cir. 1968); Colorado v. Fetty, 650 P.2d 541 (Colo. 1982) (Colorado Supreme Court rejects equal protection argument challenging automatic commitment); *In re* Downing, 103 Idaho 689, 652 P.2d 193 (1982); State v. Krol, 68 N.J. 236, 344 A.2d 289 (1975). *See also* German & Singer, *Punishing the Not Guilty: Hospitalization of Persons Acquitted by Reason of Insanity,* 29 RUTGERS L. REV. 1011 (1976).

6. The New York Times reported a "chorus of outrage from Reagan administration officials and others" in response to Hinckley's acquittal. N.Y. Times, June 23, 1982, § 1, at 1, col. 1. On Capitol Hill, the acquittal provoked outbursts of rage accompanied by demands for revision of the insanity defense. The demands for action were reinforced by Attorney General William French Smith who said: "There must be an end to the doctrine that allows so many persons to commit crimes of violence, to use confusing procedures to their own advantages, and then to have the door open for them to return to the society they victimized." N.Y. Times, June 23, 1982, § 3, at 6, col. 1. Senator Strom Thurmond, Chairman of the Senate Judiciary Committee, added: "This case has demonstrated, over the many weeks of conflicting 'expert' testimony, that there is something fundamentally wrong with the modern insanity defense." *Id.*

7. 103 S. Ct. 3043 (1983).

8. D.C. CODE ANN. § 24-301(d)(1) (1981) provides:

> If any person tried upon an indictment or information for an offense raises the defense of insanity and is acquitted solely on the ground that he was insane at the time of its committed, he shall be committed to a hospital for the mentally ill until such time as he is eligible for release pursuant to this subsection or subsection (e). . . .

Id. Under this provision, automatic commitment is permissible only if the defend-

earlier decisions[9] evincing increased concern for the procedural rights of the mentally ill caught up in the criminal justice system, the Court rejected petitioner's claim that the statute was unconstitutional and held that a finding of "not guilty of a crime by reason of insanity" was a constitutionally adequate basis for involuntary, indefinite commitment of the acquittee to a mental hospital.[10]

After examining the tumultuous development of the law regarding disposition of insanity acquittees in the District of Columbia, this note will analyze the *Jones* decision and its impact on future legislation, including reforms proposed in response to the *Hinckley* verdict.

II. HISTORICAL BACKGROUND

More than any other court, the United States Court of Appeals for the District of Columbia Circuit has paid close attention to the issues concerning the insanity acquittee and has generated several influential opinions in this area of the law.[11] Because of its compelling analysis of these constitutional issues and the fact that courts across the nation frequently refer to its analysis when considering similar provisions, it is necessary to examine the development of criminal commitment laws in the District of Columbia Circuit leading up to the *Jones* decision.

Prior to 1954, disposition of insanity acquittees in the District of Columbia was left to the discretion of the trial judge. In that year, however, the Court of Appeals for the District of Columbia Circuit decided *Durham v. United States*[12] in which the *M'Naghten* test for criminal culpability was replaced by the broader *Durham* rule. This broader insanity test, in conjunction with judicial discretion over the disposition of the insanity acquittee, was seen by many as increasing the opportunities for otherwise guilty defendants to

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ant himself raised the insanity defense. *See* Lynch v. Overholser, 369 U.S. 705, 706, 720 (1962).

9. *See infra* note 18.

10. 103 S. Ct. at 3052 (acquittee will be confined until he has regained his sanity or is no longer a danger to himself or society).

11. *See* United States v. Brown, 478 F.2d 606 (D.C. Cir. 1973); Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968).

12. In Durham v. United States, 214 F.2d 862 (D.C. Cir. 1954), a new test of responsibility was announced which later became known as the *Durham* rule. The opinion, written by Chief Judge Bazelon (who later wrote the *Bolton* opinion), stated that "[a]n accused is not criminally responsible if his unlawful act was the product of mental disease or defect." *Id.* at 874-75. The new standard was admittedly designed to broaden the class of persons who would be treated instead of punished and to facilitate communication between psychiatric experts and the courts. *See* Krash, *The Durham Rule and Judicial Administration of the Insanity Defense in the District of Columbia,* 70 YALE L.J. 905, 941 (1961).

go free. Congress responded by imposing mandatory commitment on all insanity acquittees with release dependent upon an order of the court, based on certification by a hospital administrator that the patient had recovered and was no longer dangerous.[13]

The constitutionality of these procedures was soon challenged. These challenges were based on the argument that insanity acquittees, in having been involuntarily committed without the procedural protections afforded civil committees, were denied equal protection of the laws.[14] The District of Columbia Circuit initially rejected this argument and upheld the mandatory commitment statute, justifying the difference in procedures on the notion that insanity acquittees were "an exceptional class [of people]" and that their hospitalization prevented the public from further dangerous acts and promoted their own recovery.[15]

The Supreme Court, recognizing the potential for abuse of the commitment provision by the prosecution, imposed limitations on mandatory commitment in *Lynch v. Overholser.*[16] In that case, the Court ruled that the statute could only require automatic commitment of those acquittees who themselves raised the insanity defense. It could not be applied to defendants, like Lynch, who raised the defense at the suggestion of the prosecutor.[17]

The Court chose not to decide the case on the broader basis of

13. *See supra* note 7.

14. The challenges are also often based on a due process argument which essentially duplicates the equal protection argument. As the Court in *Jones* noted, "[i]f the Due Process Clause does not require that an insanity acquittee be given the particular procedural safeguards provided in a civil-commitment hearing . . . then there necessarily is a rational basis for equal protection purposes for distinguishing between civil commitment and commitment of insanity acquittees." 103 S. Ct. at 3048 n.10. *See also* Overholser v. O'Beirne, 302 F.2d 852 (D.C. Cir. 1961); Ragsdale v. Overholser, 281 F.2d 943 (D.C. Cir. 1960); Overholser v. Leach, 257 F.2d 667 (D.C. Cir. 1958), *cert. denied,* 359 U.S. 1013 (1959).

15. Ragsdale v. Overholser, 281 F.2d at 949. The appellant had been charged with robbery and was found not guilty by reason of insanity. He had a history of significant mental aberration and irrational violence toward himself and others. *Id.* at 944.

16. 369 U.S. 705 (1962). After petitioner received treatment in a mental hospital, a psychiatrist advised the court that he was able to stand trial, but that he was suffering from a mental disease. When petitioner was brought to trial on two charges of passing bad checks, the judge refused to allow him to plead guilty. Although petitioner maintained that he was mentally responsible when the offenses were committed and presented no evidence of his insanity, the judge found him not guilty by reason of insanity and ordered him committed to a mental hospital under D.C. CODE ANN. § 24-301(d).

17. 369 U.S. at 710.

an equal protection argument.[18] This caused some lower courts, including the District of Columbia Circuit, to read *Lynch* as an implicit rejection by the Supreme Court of the equal protection challenge to automatic commitment.[19] Subsequent Supreme Court decisions, however, seemed to support the opposite view that insanity acquittees are entitled to the same procedural safeguards afforded people being civilly committed.[20] The first, and most important of these cases, is *Baxstrom v. Herold.*[21]

In *Baxstrom,* the Supreme Court declared unconstitutional a New York statute which allowed a person to be civilly committed to a mental hospital at the expiration of a prison term without the jury review available to all other civil committees and without a judicial determination that he was dangerously mentally ill.[22] The Court held that there was no justifiable basis for the difference in commitment procedures and, therefore, petitioner's equal protection rights had been violated.[23]

Although the *Baxstrom* decision did not specifically address the issue of insanity acquittees, lower courts have applied the *Baxstrom* principle in cases involving the disposition of defendants found not guilty by reason of insanity.[24] This is what Chief Judge

18. *Id.* at 711. The Court seemed to assume that the equal protection clause would not prevent an insanity acquittee from being subject to mandatory confinement.

19. *See supra* note 7.

20. Vitek v. Jones, 445 U.S. 480 (1980) (procedural due process requires that a commitment hearing precede a prisoner's transfer to a mental hospital); Jackson v. Indiana, 406 U.S. 715 (1972) (indefinite commitment of a person based solely on incompetency to stand trial held to violate equal protection); Humphrey v. Cady, 405 U.S. 504 (1972) (statute allowing commitment, in lieu of sentencing, for sex offenses violates equal protection); Specht v. Patterson, 386 U.S. 605 (1967) (alternative sentencing to an indefinite term in Colorado's "sex deviate facility" denies due process); Baxstrom v. Herold, 383 U.S. 107 (1966) (differences in commitment procedures for convicts and civil committees violates equal protection clause).

21. 383 U.S. 107 (1966). Baxstrom, while incarcerated in a New York prison, was certified insane by a prison physician. He was then transferred from prison to Dannemora State Hospital, an institution under the jurisdiction and control of the New York Department of Correction. Dannemora's director filed a petition in the Surrogate's Court stating that Baxstrom's sentence was expiring and requested that he be civilly committed under section 384 of the N.Y. Correction Law. A proceeding was held at which the state submitted medical evidence which stated that, in the opinion of the state's physicians, Baxstrom was still mentally ill and in need of hospitalization for psychiatric treatment. Baxstrom had no counsel at this hearing. It was determined, nonetheless, that Baxstrom would remain at Dannemora after the expiration of his prison term on December 18, 1961. He remained there until the Supreme Court decision in February 1966.

22. *Id.* at 115.

23. *Id.* at 114-15. The Supreme Court found that convicted criminals who are determined to be insane are not such "an exceptional class [of people]" as to justify a difference in commitment procedures.

24. Bolton v. Harris, 395 F.2d 642 (D.C. Cir. 1968). New Jersey has interpreted *Baxstrom* and *Jackson* similarly in State v. Krol, 68 N.J. 236, 251, 344 A.2d 289, 297

Bazelon did writing for the District of Columbia Circuit in the landmark case of *Bolton v. Harris.* Chief Judge Bazelon wrote:

> It is true that persons acquitted by reason of insanity have committed criminal acts and that this fact may tend to show they meet the requirements for [civil] commitment, namely, illness and dangerousness. But it does not remove these requirements. Nor does it justify total abandonment of the procedures used in civil commitment proceedings to determine whether these same requirements have been satisfied. Hence, persons found not guilty by reason of insanity must be given a judicial hearing with procedures substantially similar to those in civil commitment proceedings.[25]

The *Bolton* decision had the effect of wiping out mandatory commitment in the District of Columbia, replacing it with a post-trial commitment proceeding. Congress quickly responded with legislation designed to circumscribe the judicially-created commitment procedure. This was done through significant amendments to the District of Columbia Criminal Code, the most important of which shifted the burden of proof on the issue of commitment, following an insanity acquittal, from the District to the acquittee.[26] Rather than requiring the District to establish the requirements for involuntary civil commitment, the new legislation provided for automatic commitment and put the burden on the acquittee to satisfy the requirements for his release. In es-

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(1975): "[T]he Supreme Court in [*Baxstrom* and *Jackson*] has plainly attempted to enunciate a broad principle—that the fact that the person to be committed has previously engaged in criminal acts is not a constitutionally acceptable basis for imposing upon him a substantially different standard or procedure for involuntary commitment."

25. Bolton v. Harris, 395 F.2d at 651.

26. D.C. CODE ANN. § 24-301(d)(2) provides, in relevant part:

> (A) A person confined pursuant to paragraph (1) . . . shall have a hearing, unless waived, within 50 days of his confinement to determine whether he is entitled to release from custody. . . .
>
> (B) If the hearing is not waived, the court shall cause notice of the hearing to be served upon the person, his counsel, and the prosecuting attorney and hold the hearing. Within ten days from the date the hearing was begun, the court shall determine the issues and make findings of fact and conclusions of law with respect thereto. The person confined shall have the burden of proof. If the court finds by a preponderance of the evidence that the person confined is entitled to his release from custody, either conditional or unconditional, the court shall enter such order as may appear appropriate.

Id.

The statute does not specify the standard for determining release, but the court of appeals in *Bolton* held that as in release proceedings under section 24-301(e) and section 21-545(b), the confined person must show that he is either no longer mentally ill or no longer dangerous to himself or others in the community. *See* Jones v. United States, 432 A.2d 364, 372 & n.16 (D.C. 1981) (en banc).

sence, Congress reestablished the mandatory commitment procedure held unconstitutional in *Bolton.*

Following Congress' circumscription of the *Bolton* decision, two Supreme Court cases were decided which reinforced the position taken by Judge Bazelon and seemed to foreshadow the demise of the District of Columbia commitment statute.

The first of these cases, *Jackson v. Indiana,*[27] involved the indeterminate commitment of a deaf mute to a mental health institution on the basis of a finding that he was incompetent to stand trial.[28] The examining psychiatrist's report indicated that there was little likelihood of improvement in Jackson's condition.[29] Jackson's counsel argued that his "commitment under these circumstances amounted to a 'life sentence' without his ever having been convicted of a crime," and therefore deprived Jackson of his fourteenth amendment rights to due process and equal protection.[30]

The Supreme Court first addressed the equal protection argument. Relying on *Baxstrom,* the Court held that Jackson was denied equal protection by his commitment to an institution without a judicial determination of his dangerousness, as is afforded civil committees. Referring to Baxstrom's commitment, the Court held: "If criminal conviction and imposition of sentence are insufficient to justify less procedural and substantive protection against indefinite commitment than that generally available to all others, the mere filing of criminal charges surely cannot suffice."[31]

In regard to Jackson's due process rights, the Court held that his commitment was ordered without consideration of any of the criteria necessary to justify the exercise of Indiana's power of indefinite commitment: "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed."[32] The *Jackson* decision not only strengthened the *Baxstrom* principle, but the opinion included a specific approval of Judge Bazelon's extension of the principle to commitment of insanity acquittees in *Bolton v. Harris.*[33]

The latest Supreme Court decision expressing a more favorable

27. 406 U.S. 715.

28. *Id.* at 718.

29. *Id.* at 718-19. The doctor's report showed that Jackson's condition precluded his understanding the nature of the charges against him or participating in his defense. Jackson's intelligence was said not to be sufficient to enable him to develop the necessary communication skills.

30. *Id.* at 719.

31. *Id.* at 724.

32. *Id.* at 738.

33. *Id.* at 724. The Court also cited People v. Lally, 19 N.Y.2d 37, 224 N.E.2d 87,

attitude toward the mentally ill criminal offender is *Vitek v. Jones.*[34] In *Vitek*, a convicted felon was transferred from a state prison to a mental hospital pursuant to section 83-180(1) of the Revised Statutes of Nebraska.[35] The prisoner challenged the constitutionality of the statute on procedural due process grounds. The Court held that procedural due process requires that a commitment hearing precede a prisoner's involuntary transfer to a mental hospital.[36] The Court distinguished punishment for crime and commitment for mental illness, and noted that the latter invokes specific procedural guarantees.[37]

Although none of the *Baxstrom-Vitek* line of Supreme Court decisions directly address the issue of commitment standards for insanity acquittees, many lower courts have interpreted these cases as requiring substantially equivalent procedures for commitment of insanity acquittees and those individuals civilly committed.[38] Legislative enactments in this area, prior to the public outcry in response to the *Hinckley* verdict, seemed to follow this trend.[39] Since the *Hinckley* verdict, however, forty bills to abolish or reform the insanity defense have come under congressional consideration. Legislatures in many states are also considering

277 N.Y.S.2d 654 (1966), as support. 406 U.S. at 724. It also noted its own extension of *Baxstrom* in Humphrey v. Cady, 405 U.S. 504 (1972). 406 U.S. at 724-25.

34. 445 U.S. 480.

35. NEB. REV. STAT. § 83-180(1) (1979) provides:

> When a physician designated by the Director of Correctional Services finds that a person committed to the department suffers from a physical disease or defect, or when a physician or psychologist designated by the director finds that a person committed to the department suffers from a mental disease or defect, the chief executive officer may order such person to be segregated from other persons in the facility. If the physician or psychologist is of the opinion that the person cannot be given proper treatment in that facility, the director may arrange for his transfer for examination, study, and treatment to any medical-correctional facility, or to another institution in the Department of Public Institutions where proper treatment is available. A person who is so transferred shall remain subject to the jurisdiction and custody of the Department of Correctional Services and shall be returned to the department when, prior to the expiration of his sentence, treatment in such facility is no longer necessary.

Id.

36. 445 U.S. at 495.

37. *Id.* at 491-94.

38. *See supra* note 24 and accompanying text.

39. For evidence of a reduction in the number of states requiring automatic commitment, see *Commitment and Release of Persons Found Not Guilty by Reason of Insanity: A Georgia Perspective,* 15 GA. L. REV. 1065, 1090-91 (1981). *See also Commitment Following Acquittal by Reason of Insanity and the Equal Protection of the Laws,* 116 U. PA. L. REV. 924 (1968).

the reform or abolition of the defense.[40]

Against this backdrop, the *Jones* case found its way to the Supreme Court. In what appears to be an assurance that insanity acquittees like Hinckley will not escape confinement, the Supreme Court held that a defendant acquitted by reason of insanity could be involuntarily committed to a mental institution for an indefinite period on the sole basis of his insanity acquital.[41]

III. FACTUAL HISTORY

On September 19, 1975, Michael Jones was arrested for attempting to steal a jacket from a department store. He was first admitted to St. Elizabeth's, a hospital for the mentally ill, because of a court-ordered competency examination.[42] On March 12, 1976, on stipulated facts as to the crime and insanity, Jones was found not guilty by reason of insanity. On May 25, 1976, the hearing (required within fifty days of the commitment by District of Columbia Code Annotated section 24-301(d)(2)(A)),[43] was held, and because he failed to prove by a preponderance of the evidence that he was no longer mentally ill or dangerous to himself or others, Jones remained confined at St. Elizabeth's.[44]

A second release hearing was held on February 22, 1977, at which Jones raised the argument that his confinement under section 301(d) could not extend beyond his hypothetical maximum sentence and that he was therefore entitled to release or civil commitment under District of Columbia Code Annotated section 21-545(b).[45] Jones' motion for release or civil commitment was

40. 7 MENTAL DISAB. L. REP. 136, 137 (1983).

41. 103 S. Ct. at 3050.

42. The psychologist's report stated that Jones was competent to stand trial, "but that he had signs and symptoms of a severe mental disorder, including auditory hallucinations, and that he should be hospitalized at St. Elizabeth's for treatment." Jones v. United States, 432 A.2d 364, 368 n.3 (D.C. 1981).

43. *See supra* note 26.

44. 103 S. Ct. at 3047.

45. D.C. CODE ANN. § 21-545(b) provides:

> If the court or jury, as the case may be, finds that the person is not mentally ill, the court shall dismiss the petition and order his release. If the court or jury finds that the person is mentally ill and, because of that illness, is likely to injure himself or other persons if allowed to remain at liberty, the court may order his hospitalization for an indeterminate period, or order any other alternative course of treatment which the court believes will be in the best interests of the person or of the public. The Commission, or a member thereof, shall be competent and compellable witnesses at a hearing or jury trial held pursuant to this chapter. The jury to be used in any case where a jury trial is demanded under this chapter shall be impaneled, upon order of the court, from the jurors in attendance upon other branches of the court, who shall perform the services in addition to and as part of their duties in the court.

Id.

later denied, and his indefinite confinement at St. Elizabeth's was continued.[46]

Jones appealed to the District of Columbia Court of Appeals. A panel of the court affirmed the finding of the Superior Court,[47] but then granted a rehearing and reversed.[48] Finally, the court heard the case en banc and affirmed the decision of the Superior Court.[49] The court of appeals ultimately rejected the argument that the maximum length of prison sentence had some bearing on Jones' release. The court also rejected the equal protection argument, and held that the differences in commitment procedures for insanity acquittees and civil committees were justified.[50]

The Supreme Court granted certiorari[51] and, in a five to four opinion, affirmed the decision of the court of appeals. The Court decided that an insanity acquittal is adequate justification for commitment,[52] and that the hypothetical maximum sentence has no bearing on the acquittee's release.[53]

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46. 103 S. Ct. at 3047. "Three months later, however, [Jones] was granted conditional release on terms recommended by St. Elizabeths' staff, allowing daytime and overnight visits into the community." 432 A.2d at 368 n.6.

47. Jones v. United States, 396 A.2d 183 (D.C. 1978). The court held that there was no constitutional requirement that Jones be released or civilly committed at the end of the maximum sentence period because that period bore no relationship to the basis for his confinement—mental illness and dangerousness to self or others. *Id.* at 189. The court also rejected Jones' equal protection argument, stating: "the difference in hearing procedures is arguably justified; there is no constitutional prohibition against rational differences in the treatment of differently situated persons." *Id.*

48. Jones v. United States, 411 A.2d 624 (D.C. 1980). This time the court acknowledged the punitive nature of criminal commitment and held, as a matter of equal protection vis-a-vis civil commitment, that an insanity acquittee may not be confined for treatment beyond the maximum sentence for the underlying criminal charge. *Id.* at 630-31.

Recognizing a punitive basis for criminal commitment has important constitutional implications, as the Court noted in *Jones:*

> It is questionable that confinement to a mental hospital would pass constitutional muster as appropriate punishment for any crime. The insanity defense has traditionally been viewed as premised on the notion that society has no interest in punishing insanity acquittees, because they are neither blameworthy nor the appropriate objects of deterrence.

103 S. Ct. at 3054 n.4. *See also* A. GOLDSTEIN, THE INSANITY DEFENSE 15 (1967).

49. Jones v. United States, 432 A.2d 364 (D.C. 1981). The court rejected the punitive rationale, concluding that Jones' confinement bore no relation to the maximum hypothetical sentence.

50. *Id.* at 373. The court justified the difference in the two procedures by referring back to its first panel opinion. 396 A.2d at 189.

51. 454 U.S. 1141 (1982).

52. 103 S. Ct. at 3050.

53. In its argument, the government was careful to disclaim any punitive basis

IV. THE OPINION

Justice Powell, writing for the majority, first addressed the issue of whether an insanity acquittal could justify commitment. In enacting the District of Columbia commitment statute, Congress had determined that two facts were established by an insanity acquittal: that the defendant committed an act that constitutes a criminal offense, and that he committed the act because of mental illness constituting an adequate basis for hospitalizing the acquittee as a dangerous and mentally ill person.[54] In a generous deferral to congressional prerogative, Justice Powell wrote: "We cannot say that it was unreasonable and therefore unconstitutional for Congress to make this determination."[55] In spite of petitioner's suggestion that the requisite dangerousness is not established by proof that a person committed a nonviolent crime against property, the Court held that commission of a criminal act "certainly indicates dangerousness . . . at least as persuasive[ly] as any predictions about dangerousness that might be made in a civil commitment proceeding."[56] The majority further supported Congress' determination by adopting the presumption of continued insanity, whereby a defendant who asserts that he was insane at the time of the crime is presumed to be presently insane.[57]

By adopting the presumptions of dangerousness and continued insanity arising from an insanity acquittal, the Court, in essence, equated an insanity acquittal with the findings required for civil commitment: present mental illness and dangerousness. In what was perhaps a recognition of the tenuous nature of these presumptions, the Court added that "the Due Process Clause does not require Congress to make classifications that fit every individual with the same degree of relevance."[58] Referring specifically to the presumption of continued insanity, the Court noted that a hearing is provided within fifty days of the commitment, thereby giving every acquittee a prompt opportunity to obtain release if

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for commitment of insanity acquittees, avoiding the problem encountered in the lower court. 103 S. Ct. at 3054.

54. *See* H.R. REP. NO. 91-907, 91st Cong., 2d Sess. 73 (1970).

55. 103 S. Ct. at 3049.

56. *Id.* In response to Jones' argument, the Court cited Overholser v. O'Beirne, 302 F.2d 852, 861 (D.C. Cir. 1961): "[T]o describe the theft of watches and jewelry as 'non-dangerous' is to confuse danger with violence. Larceny is usually less violent than murder or assault, but in terms of public policy the purpose of the statute is the same as to both." The *Jones* Court added: "[It] may be noted that crimes of theft frequently may result in violence from the efforts of the criminal to escape or the victim to protect property or the police to apprehend the fleeing criminal." 103 S. Ct. at 3050 n.14.

57. 103 S. Ct. at 3050.

58. *Id.*

he has recovered.[59]

The Court next addressed a claim by petitioner that the civil commitment requirement of proof by clear and convincing evidence established in *Addington v. Texas*[60] had not been met in that the proof of his insanity was based only on a preponderance of the evidence. The Court responded by explaining that in *Addington* the more stringent standard of proof for civil commitment was justified by a concern that members of the public could be confined on the basis of mere idyosyncratic behavior.[61] This concern is significantly reduced where the acquittee has himself advanced insanity as a defense and has implicitly admitted committing a criminal act.

The final issue addressed by the Court was whether petitioner was nonetheless entitled to his release because he had been hospitalized for a period longer than he could have been incarcerated if convicted. The Court resolved this issue by explaining that the purpose underlying the commitment of an insanity acquittee is different from that regarding imprisonment of a convicted criminal. The insanity acquittee is committed for treatment of the individual's mental illness and to protect him and society from his potential dangerousness.[62] A criminal is incarcerated for a particular length of time reflecting society's view of the proper response to the particular crime committed. In light of this difference, the Court held that the hypothetical maximum sentence is irrelevant: "There simply is no necessary correllation between severity of the offense and the length of time necessary for recovery."[63]

V. DISSENT

Four Justices disagreed with the view expressed in the majority opinion: Justices Marshall and Blackmun, who joined Justice Brennan's dissenting opinion, and Justice Stevens who dissented separately.

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59. *See supra* note 24.

60. 441 U.S. 418 (1979). The Supreme Court held that a "clear and convincing" standard of proof is required by the fourteenth amendment in a civil proceeding brought under state law to involuntarily commit an individual for an indefinite period of time. *Id.* at 433.

61. *Id.* at 427.

62. 103 S. Ct. at 3051.

63. *Id.* at 3052. Thus, the Court adopted the approach originally taken by the court of appeals.

Justice Brennan's dissent began by chastising the majority for posing the wrong question:

> The issue in this case is not whether petitioner must be released because he has been hospitalized for longer than the prison sentence he might have served had he been convicted, . . . [but] whether the fact that an individual has been found not guilty by reason of insanity by itself provides a constitutionally adequate basis for involuntary, indefinite commitment to psychiatric hospitalization.[64]

Justice Brennan attacked the majority's holding that a finding of insanity at a criminal trial "is sufficiently probative of mental illness and dangerousness to justify commitment."[65] Despite their superficial appeal, the presumptions of continuing insanity and dangerousness could not, he argued, excuse the government from satisfying the *Addington* burden of proof with respect to present mental illness and dangerousness in committing petitioner for an indefinite period.[66]

The dissent examined precedents in other commitment contexts and found them to be inconsistent with the argument that the mere facts of past criminal behavior and mental illness justify indefinite commitment without the procedural benefits afforded persons undergoing civil commitment.[67] Justice Brennan pointed out that the government's interests in committing the insanity acquittee are the same interests involved in civil commitments—isolation, protection, and treatment of a person who poses a danger to himself or others. In those civil commitment cases, particularly *Addington,* the individual's interest in liberty required the government to bear the burden of persuasion by clear and convincing evidence.[68] The minority in *Jones* simply felt that even for someone who has implicitly admitted committing a criminal act, the findings embodied in an insanity acquittal are not an adequate substitute for the due process protections afforded civil committees.[69]

Justice Brennan saw serious problems with the majority's equation of an insanity acquittal with the findings required for involuntary civil commitment—present mental illness and dangerousness. An insanity acquittal, he argued, is "backward looking, focusing on one moment in the past, while commitment requires

64. *Id.* at 3053 (Brennan, J., dissenting).

65. *Id.* at 3049.

66. *Id.* at 3055.

67. The most significant of these protections is the government's bearing the burden of proof with respect to present mental illness and dangerousness.

68. 441 U.S. at 433. *See supra* note 60.

69. Since the government disclaimed any punitive rationale for Jones' commitment, the dissent believed the only alternative was commitment according to the constitutional procedures developed in accordance with due process principles.

a judgment as to the present and future."[70] Although the majority had made an attempt to overcome this disparity through the use of the presumptions of dangerousness and continued insanity, Justice Brennan responded by noting the difficulty that mental health professionals have in predicting whether any one person will be dangerous.[71] He added:

> Research is practically nonexistent on the relationship of *non-violent* criminal behavior, such as petitioner's attempt to shoplift, to future dangerousness. We do not even know whether it is even statistically valid as a predictor of similar non-violent behavior, much less of behavior posing more serious risks to self and others.[72]

On the issue of continued insanity, Justice Brennan explained: "As for mental illness, certainly some conditions that satisfy the 'mental disease' element of the insanity defense do not persist for an extended period."[73] Since the elements of an insanity defense required only: (1) mental illness at the time of the crime; and (2) causation between the mental illness and the crime,[74] the dissent argued that an insanity acquittal cannot legitimately excuse the government from the burden of proving that the acquittee is presently mentally ill and dangerous to himself or others.[75]

In a separate dissent, Justice Stevens implicitly accepted a punitive rationale for confining the insanity acquittee: "A plea of not guilty by reason of insanity . . . may provide a sufficient basis for confinement for the period fixed by the legislature as punishment for the acknowledged conduct. . . ."[76] If the acquittee is to be confined for a longer period, he argued, the state must civilly commit him.[77]

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70. 103 S. Ct. at 3056 (Brennan, J., dissenting). The Court further noted that, in some jurisdictions, including federal courts, an acquittal by reason of insanity may mean only that a jury found a reasonable doubt as to defendant's sanity and as to the causal relationship between his mental condition and his crime. *See* Davis v. United States, 160 U.S. 469 (1895).

71. 103 S. Ct. at 3057 (Brennan, J., dissenting).

72. *Id.*

73. *Id.* at 3058. For medical information on the rapid action of the major tranquilizers, see L. KOLB & A. NOYES, MODERN CLINICAL PSYCHIATRY 623-24 (12th ed. 1980); S. ARIETI, AMERICAN HANDBOOK OF PSYCHIATRY 444 (2d ed. 1975).

74. The District of Columbia uses the ALI insanity test. *See supra* note 2.

75. 103 S. Ct. at 3061 (Brennan, J., dissenting).

76. *Id.* (Stevens, J., dissenting). Justice Stevens' analysis thus paralleled that of the court of appeals. Stevens went so far as to characterize Jones' commitment as "incarceration." *Id.*

77. *Id.*

VI. ANALYSIS

As Justice Brennan pointed out in his dissent, the real issue in this case was whether the successful assertion of the insanity defense can, by itself, justify the acquittee's indefinite commitment to a mental hospital.[78] In its analysis of this issue, the majority conspicuously disregarded several significant Supreme Court decisions[79] bearing on the acquittee's due process and equal protection rights, in favor of a generous deferral to Congress' fear that "dangerous criminals, particularly psychopaths" would use the defense to escape confinement entirely.[80] By adopting two presumptions[81] of dubious validity, the majority attempted to diffuse petitioner's due process argument by equating the elements of an insanity acquittal with the findings required for involuntary civil commitment.

A. Presumption of Dangerousness

The majority stated: "The fact that a person has been found, beyond a reasonable doubt, to have committed a criminal act certainly indicates dangerousness."[82] While superficially appealing, this proposition is in direct contradiction to Supreme Court precedent, statistically unfounded and, therefore, constitutionally inadequate.

The majority seems to have disregarded an important principle found in *Baxstrom.* There, the Supreme Court held that the commission of a criminal act did *not* give rise to a presumption of dangerousness which could justify a difference in commitment procedures.[83] In discussing "dangerousness," the Court surprisingly made no mention of *Baxstrom.* Instead, the most persuasive support it could muster for its holding on this issue was that "courts should pay particular deference to reasonable legislative

78. Once this issue is resolved in favor of upholding the insanity acquittee's initial commitment independent of any punitive rationale, the length of sentence becomes irrelevant.

79. *See supra* note 20.

80. 103 S. Ct. at 3049. *See also* H.R. REP. No. 907, 91st Cong., 2d Sess. (1970).

81. One is the presumption of continuing insanity. The other is the presumption of dangerousness arising from the fact that the defendant committed a criminal act.

82. 103 S. Ct. at 3049.

83. 383 U.S. at 114. In *Baxstrom,* the Court held:

> Where the State has provided for a judicial proceeding to determine the dangerous propensities of all others civilly committed to an institution of the Department of Correction, it may not deny this right to a person in Baxstrom's position solely on the ground that he was nearing the expiration of a prison term.

Id. See also supra note 24 and accompanying text.

judgments."[84]

Not only is the presumption of dangerousness in conflict with *Baxstrom,* it also appears to lack medical support. A long-term study of criminally insane patients who were released as a result of a federal court decision in Pennsylvania concluded: "In any proportion of the criminally insane, the proportion who would repetitively commit serious violent acts is quite small and the overall policy concerning the treatment of the criminally insane should not be based on the behavior of this small group."[85]

A study done in New York provided similar results. Nine hundred sixty-nine prisoner patients were transferred to civil hospitals as a result of a court decision. Psychiatrists had determined that these patients were too dangerous for such transfers. Nevertheless, less than one percent actually proved to be dangerous.[86]

These statistics certainly do not prove that insanity acquittees are not dangerous. These studies do, however, raise questions about the constitutional validity of the presumption of dangerousness, particularly in the complete absence of studies which support a contrary position.

The Supreme Court has set explicit standards which a statutory presumption must satisfy in order to "pass constitutional muster."[87] "[It must be shown with] substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend."[88] Civil cases have also held that it is arbitrary and unconstitutional to deprive an individual of existing rights on the basis of a presumption which may be generally true of persons in the individual's class.[89]

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84. 103 S. Ct. at 3050 n.13. The dissent noted the weakness of the majority's analysis of the dangerousness issue, stating: "[A] State may consider non-violent misdemeanors 'dangerous,' but there is room for doubt whether a single attempt to shoplift and a string of brutal murders are equally accurate and equally permanent predictors of dangerousness." *Id.* at 3058. The dissent stated further: "It is difficult to see how the Court's generalization justifies relieving the Government of its *Addington-O'Connor* burden of proving present dangerousness by clear and convincing evidence." 103 S. Ct. at 3058 n.13.

85. THORNBERRY & JACOBY, THE CRIMINALLY INSANE: A COMMUNITY FOLLOWUP OF MENTALLY ILL OFFENDERS 210 (1980).

86. Hunt & Wiley, *Operation Baxstrom After One Year,* 124 AM. J. PSYCHIATRY 974 (1968).

87. Leary v. United States, 395 U.S. 6, 32-36 (1969).

88. *Id.* at 36.

89. Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 644-46 (1974) (a woman, five months pregnant cannot teach safely or effectively); Vlandis v. Kline, 412 U.S. 441, 443 (1973) (university student is not a resident of the city where he attends school

The studies noted above indicate that the presumption of dangerousness arising from past criminal conduct fails this constitutional test. While criminal conduct is certainly of some evidentiary value in assessing a person's dangerousness, nonviolent criminal behavior does not seem to evince the dangerousness required for involuntary commitment. It is hardly the "persuasive evidence" the majority claimed it to be, and it is certainly not so conclusive as to justify the Court's excusing the state from proving the insanity acquittee's dangerousness prior to indefinite commitment.

B. Presumption of Continuing Insanity

At first glance, the majority's justification for the presumption of continued insanity appears reasonable. The conclusion that "someone whose mental illness was sufficient to lead him to commit a criminal act is likely to remain ill,"[90] indeed seems to comport with common sense. The presumption, however, becomes more fiction than fact as the time between the commission of the crime and the trial increases.

Often, many months pass between the time of the act and the time of trial. If the defendant has been found incompetent to stand trial, this time is most often spent undergoing treatment in a mental hospital. Today, through the administration of psychotropic medications, dramatic relief from serious psychotic symptoms can be achieved within a matter of weeks.[91] Further, as the minority noted: "[C]ertainly some conditions that satisfy the 'mental disease' element of the insanity defense do not persist for an extended period."[92]

The majority attempted to minimize the ultimate effect of the inference of continuing mental illness by reference to the fact that a hearing is provided within fifty days of the commitment at which the acquittee has an opportunity to obtain release if he has recovered.[93] In offering the fifty-day hearing as an alternative de-

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if he was a nonresident at the time of application); Stanley v. Illinois, 405 U.S. 645 (1972) (unwed father is unfit parent). *But see* Weinberger v. Salfi, 422 U.S. 749, 767-73 (1975) (nine month duration-of-relationship requirement to prevent the use of sham marriages to secure social security payment held constitutional).

90. 103 S. Ct. at 3050.

91. *See supra* note 73.

92. 103 S. Ct. at 3058.

93. Under section 24-301(d)(2) (*see supra* note 26), instead of the state bearing the burden of proving that the individual is presently mentally ill, as due process requires for civil commitment, the insanity acquittee finds himself confined subject to his ability to prove that he is no longer insane. A shift in the burden of proof, under these circumstances, is often outcome-determinative. *See* Waite v. Jacobs, 475 F.2d 392, 395 (D.C. Cir. 1973).

termination of present mental illness, the Court ignored the significance of a shift in the burden of proof where insanity is at issue.

The only justification offered by the Court for its holding on this issue was that the inference of continued insanity "comports with common sense."[94] The Court supported its finding on due process grounds with a reference to the fact that "legislative classifications need not be perfect."[95] However, while the rational basis analysis may not always require perfect classifications, it is clear that accurate classifications are needed where an individual's liberty is at stake.

C. Length of Commitment

Once the Court justified the initial commitment of the insanity acquittee wholly apart from any punitive rationale, it followed that the hypothetical maximum sentence would have no bearing on the patient's release. The Court easily distinguished the factors underlying imprisonment and commitment and held that the patient's release would have nothing to do with the possible sentence for conviction of the crime, but would depend solely on whether or not he had recovered.[96]

In his dissent, Justice Stevens argued that the length of sentence *did* have some bearing on the patient's release.[97] This conclusion can only be reached, however, if one acknowledges a punitive basis for the acquittee's initial confinement. While a punitive treatment of the insanity acquittee would seem to clash with the very nature of the defense,[98] there has been a recent movement to deemphasize the concept of "lack of criminal responsibility," and to allow the court to sentence the insanity acquittee to a prison term.[99] Justice Stevens' approach would similarly allow punishment of the insanity acquittee for the maxi-

94. 103 S. Ct. at 3050.

95. *Id.*

96. *Id.* at 3052.

97. *Id.* at 3061 (Stevens, J., dissenting).

98. The insanity defense is based on the principle that some offenders, because of mental illness, are not criminally responsible and, therefore, are not proper subjects for punishment. *See* A. GOLDSTEIN, THE INSANITY DEFENSE 6-11 (1967).

99. *See Sherman, Guilty But Mentally Ill: A Retreat from the Insanity Defense,* 7 AM. J. OF LAW & MED. 237 (1981).

mum sentence period, subject to the acquittee's proving that he has recovered.

While the government and the majority contended that the District of Columbia commitment statute lacked any punitive basis, close scrutiny of the statute and its practical effects compels a different conclusion. A statute motivated by a congressional fear that dangerous criminals may escape confinement, and which allows the District to commit the acquittee without ever proving his present mental illness and dangerousness, must be based at least in part on a punitive rationale. Recognition of this fact renders Justice Stevens' contention valid—the length of sentence should indicate the time at which the acquittee would have to be released or committed pursuant to the civil commitment procedures.

VII. IMPACT

The immediate impact of the *Jones* decision will not be great. By finding the District of Columbia's mandatory commitment statute[100] constitutional, the Supreme Court has expressed judicial approval of the most restrictive, in terms of due process, of the four types of commitment schemes.[101]

The long term impact of the decision, however, may be of much greater significance. As legislatures across the country consider proposals to reform or abolish the insanity defense, they will do so with the knowledge that the Supreme Court has given them free reign concerning the disposition of the insanity acquittee. If the legislatures respond to the public's fear that "dangerous criminals will go free" as a result of the defense, mandatory commitment of insanity acquittees may become the rule. The efficacy of the defense itself could disappear as the difference between "imprisonment" and "hospitalization" becomes increasingly insignificant.

VIII. CONCLUSION

The Court appears to have succumbed to the ideological complexities of the insanity defense. It should seem fairly clear that a person who is acquitted is entitled to his freedom unless the state can justify his confinement on some other basis. If the punitive motivations for commitment are completely disregarded, then the insanity acquittee stands in relatively the same position as any other candidate for involuntary civil commitment and should be

100. *See supra* note 8.
101. *See supra* note 4.

afforded the same procedural safeguards. While an insanity acquittal may provide that the defendant should be institutionalized for the benefit of himself and the public, the criminal trial does not conclusively satisfy the due process requirements for such an infringement on the acquittee's right to liberty. When the criminal conduct involved is a non-violent crime, the trial has no real bearing on either the defendant's dangerousness to himself or others or, as in this case, on the insanity acquittal as a basis for involuntary confinement.

The majority seems to have been motivated by a concern that there will be defendants who can obtain an insanity acquittal, but for whom the state will not be able to satisfy civil commitment requirements. While this is admittedly a difficulty created by the insanity defense as it is currently implemented in most jurisdictions, the solution does not lie in the elimination of the requirements for commitment.[102] If it is too difficult to accept the proposition that the insanity acquittee may escape confinement, then the solution is reform of the insanity defense. Congress, and now the Supreme Court, have merely mistreated a symptom in their tacitly punitive and constitutionally inadequate disposition of the insanity acquittee.

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102. For discussion of the problems with the insanity defense, see generally, WINSDALE AND ROSS, THE INSANITY PLEA (1983); N. MORRIS, MADNESS AND THE CRIMINAL LAW (1982).